FILE COPY

SUPREME COURT, U.S.
FILED
AUG 11 1959
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 262

CRISTOBAL GONZALES PADILLA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

CRISTOBAL GONZALES PADILLA,
=75128—P. M. B.,
Leavenworth, Kansas.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

INDEX

Subject Index

I. Statement 1

II. Opinions Below 2

III. Jurisdictional Statement 2

IV. Statement of the Case 3

V. Statement of Facts 6

VI. Questions Presented 11

VII. Statute Involved 11

VIII. Reasons Relied Upon for the Writ 12

IX. Argument—

Point I. Petitioner's plea of not guilty to the possession of the narcotic drug invoked the statutory presumption and the trial court should have rejected the waiver of jury in this criminal case. 21 U.S.C.A., Sec. 174 13

Point II. There was no proof of guilt, direct or circumstantial, to sustain the trial court's finding of guilt on Count Four of the indictment 17

Point III. There was no proof of guilt, direct or circumstantial, that petitioner entered the conspiracy on February 20, 1957 22

Point IV. The refusal of the United States Custom Agents to return the money belonging to the petitioner violates the due process clause of the Fifth Amendment to the United States Constitution 25

X. Prayer for the Writ 28

Authorities Cited

Cases—

Aetna Insurance Co. v. *Kennedy*, 57 S. Ct. 809 17
Braverman v. *United States*, 317 U.S. 49, 53, 63 S. Ct. 99, 87 L. Ed. 23 23
Burn v. *United States*, 279 Fed. 982 25
Callagh v. *United States*, 8 Cir., 15 F.2d 929, 931 21
Carlson v. *United States*, 10 Cir., 249 F.2d 85, 86 22, 23
Eng Jung v. *United States*, 3 Cir., 46 F.2d 63, 67 20-21
Garrison v. *United States*, 5 Cir., 163 F.2d 874 20
Glasser v. *United States*, 315 U.S. 60 16
Hauger v. *United States*, 4 Cir., 173 Fed. 54 25
Isenhour v. *United States*, 256 Fed. 842 25
Johnson v. *Zerbst*, 304 U.S. 458 17
Kassin v. *United States*, 5 Cir., 87 F.2d 183, 184 18
Kelton v. *United States*, 294 Fed. 491, 495 25
Kuhn v. *United States*, 9 Cir., 26 F.2d 463 25
Nathanson v. *Murphy*, 132 Cal. App. 2d 363, 282 P.2d 174 14, 17
Ohio Bell Telephone Co. v. *Public Utilities Commission*, 57 S. Ct. 724 17
Philphaw v. *United States*, 8 Cir., 29 F.2d 225, 227 21
Pope v. *United States*, 289 Fed. 312, 315 25
Stubbs v. *United States*, (C.C.A.) 249 Fed. 571 24
Terry v. *United States*, (C.C.A.) 7 F.2d 28 24
Thomas v. *United States*, 10 Cir., 57 F.2d 1039, 1041 25
Thomas v. *United States*, 10 Cir., 239 F.2d 7, 10 19, 20
Tinsley v. *United States*, 8 Cir., 43 F.2d 899 23, 24
United States v. *Falcone*, 311 U.S. 205, 210, 61 S. Ct. 204, 85 L. Ed. 128 23
United States v. *Goldberg*, 7 Miss. 175, Fed. Cas. No. 15,233 25
United States v. *Landry*, 7 Cir., No. 12,268, F.2d , dec., July 30, 1958 15, 26

United States v. *McKee*, 3 Dill. 551, Fed. Cas. No. 15,686 25
United States v. *Richards*, D. C. Neb. 1906, 149 Fed. 443 25
United States v. *Wainer*, 7 Cir., 170 F.2d 603, 606 20
United States v. *Yeoman-Henderson, Inc.*, 7 Cir., 193 F.2d 867 21
Vick v. *United States*, 5 Cir., 216 F.2d 228, 233 20
Woodward Laboratories v. *United States*, 9 Cir., 198 F.2d 995, 998 21
Wyatt et al. v. *United States*, (C.C.A.) 23 F.2d 791 24
Yoffee v. *United States*, 1st Cir., 153 F.2d 570 21

Text Books Cited—

12 Cyclopedia of Fed. Pro., 3rd Edition, Secs. 51-72, Par. 448 21
12 Cyclopedia of Fed. Pro., 3rd Edition, Secs. 51-75, Pars. 481-482 21
12 Cyclopedia of Fed. Pro., 3rd Edition, p. 463 21
12 Cyclopedia of Fed. Pro., 3rd Edition, p. 483 21

Federal Rules of Criminal Procedure—

Rule 7(c), Fed. Rules of Cr. Pro. 22
Rule 37, Fed. Rules of Cr. Pro. 2
Rule 22 (2), Revised Rules, Supreme Court of the United States 3

Statutes Involved—

18 U.S.C.A., Section 3231 2
18 U.S.C.A., Section 371 23
21 U.S.C.A., Section 174 3, 4, 5, 11, 12, 14, 15, 16, 17, 18, 19, 20
28 U.S.C.A., Section 1291 2
28 U.S.C.A., Section 1254(1) 2

Provisions of Constitution Involved—

United States Const., Amend. 5 25
United States Const., Amend. 6 15, 22
Article III, Section II, Clause III 12, 13-14, 16

IN THE

SURREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No.

CRISTOBAL GONZALES PADILLA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Chief Justice of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:

I.

STATEMENT.

Petitioner respectfully prays that a writ of certiorari issue to review the decision of the United States Court of

Appeals for the Ninth Circuit entered on May 6, 1959, affirming the judgment of conviction entered on May 6, 1957, of the United States District Court for the Southern District of California, Central Division, Los Angeles.

II.

OPINIONS BELOW.

The judgment sought to be reviewed was entered on May 6, 1959, and it is not understood as yet being officially reported; the opinion of the Court of Appeals below is appendixed at pages A1-A3 of the appendix herein. Petitioner was granted until June 15, 1959, to apply for a rehearing; petition for a rehearing was denied on June 4, 1959; the order notifying denial of rehearing without further opinion is set forth in the appendix at page A4; the mandate of the Court of Appeals below was issued on June 12, 1959, see appendix page A5.

III.

JURISDICTIONAL STATEMENT.

The jurisdiction of the United States District Court for the Southern District of California, Los Angeles, was predicated upon the provisions of Title 18, U.S.C.A., Section 3231.

The United States Circuit Court of Appeals for the Ninth Circuit had appellate jurisdiction to review the judgment of conviction of the District Court pursuant to Title 28, U.S.C.A., Section 1291.

The jurisdiction of this Honorable Court to review the judgment of the United States Court of Appeals for the Ninth Circuit is invoked pursuant to Title 28, U.S.C.A., Section 1254(1), and the Fed. Rules of Cr. Pro., Rule 37.

The time in which to file the petition for writ of certiorari is governed by Rule 22 (2) of the Revised Rules of this Honorable Court which limits the time to thirty days in a criminal case, unless enlarged by order of the Court or a justice thereof. An order was entered on June 29, 1959, extending the time to August 3, 1959, in which to file the petition for writ of certiorari, see appendix page A6.

IV.

STATEMENT OF THE CASE.

The indictment, in five counts, was filed on March 13, 1957, charging petitioner and his co-defendants, Antonio Espinoza Ramos and Issac Gomez Gomez, with violations of Title 21, U.S.C.A., Section 174 (R. 2 through 7). Counts one, two and three of the indictment do not involve petitioner and for the sake of brevity are omitted from this petition. Attention is called to the overt acts in count five of the indictment; there are nine overt acts, eight of these overt acts are directed at the charges in counts one, two and three, not involving this petitioner, in that, the trial judge held that petitioner did not enter into the conspiracy until February 20, 1957 (R. 1000), and all overt acts, excepting number nine, are omitted but may be found in the appendix to this petition at page A7. It is deemed necessary to set forth count four in its entirety, viz:

Count Four: On or about February 20, 1957, in San Diego County, California, within the Southern Division of the Southern District of California, defendants Issac Gomez Gomez and Cristobal Gonzales Padilla did, after importation, *knowingly and unlawfully* receive, conceal, and transport, and facilitate the concealment and transportation of, a certain narcotic drug, namely: approximately 25 ounces of heroin, *and knowingly assist* in so doing, which said

heroin, as the defendants then and there well knew, had been imported into the United States of America contrary to law, in violation of United States Code, Title 21, Section 174. *Id.* (Italics supplied).

Count Five: Beginning on or about February 4, 1957, and continuing to the date of the return of this indictment, defendants Antonio Espinoza Ramos, Issac Gomez Gomez and Cristobal Gonzales Padilla did agree, confederate and conspire together to commit certain offenses against the United States as follows: to *fraudulently and knowingly* import and bring into the United States certain narcotic drugs, namely: Heroin and smoking opium, contrary to law, and to conceal, sell, transport and facilitate the concealment, sale and transportation of said narcotic drugs after being imported and brought into the United States contrary to law, in violation of United States Code, Title 21, Section 174:

To effect the objects of said conspiracy the defendants committed divers overt acts in the Southern District of California among which are the following:

Note: The trial judge held (R. 1000), that from February 4, 1957, to February 11, 1957, that the government could not prove a conspiracy. This involves overt acts one, two, three and four which are omitted from this statement but may be found in the appendix at page A7. The trial judge then held (R. 1000), that from February 12, 1957, to February 20, 1957, that there was evidence of a conspiracy between co-defendants Ramos and Gomez.[1] Again the trial judge held (R. 1000), that he believed that there was evidence that petitioner entered the conspiracy on February 20, 1957.

---

1. R. S. Cantu mentioned in the overt acts is an agent of the Narcotic Bureau.

The only overt act here that involves the petitioner is No. 9, which charges as follows: On or about February 20, 1957, in San Diego County, California, defendants Issac Gomez Gomez and Cristobal Gonzales Padilla, facilitated the transportation and concealment of approximately 25 ounces of heroin. *Id.* (Italics supplied).

The trial judge did not advise that petitioner was entitled to a trial by jury as guaranteed by the Federal Constitution; nor did he advise petitioner that there was a statutory right embedded in (Title 21, U.S.C.A., Section 174). Petitioner's attorney and the United States Attorney agreed that they would try the case without a jury and asked petitioner to sign a waiver. The United States Attorney merely stated to the trial judge that trial by jury has been waived, the trial judge not making any comments or advising petitioner as to the Constitutional and statutory rights to trial by jury. The trial judge, sitting without a jury, dismissed count one against co-defendant Ramos at the conclusion of the Government's case in Chief (R. 452); and held that from February 4, 1957, to February 11, 1957, there was no evidence or proof of a conspiracy (R. 1001) and granted the Government's motion relative to the application of the evidence[2] (R. 1000) and on May 6, 1957, found petitioner guilty on counts four and five, overruling motion for a new trial (R. 1006), and sentenced petitioner for a term of five years on count four and ten years on count five, the terms to run consecutively; total fifteen years; no fine was imposed (R. 1002).

Italics supplied as petitioner's unless otherwise specified.

2. Subsequent to the 12th, I think that there is evidence in the case which will sustain a finding that there was a conspiracy and any statement made by any one of the parties implicating the other should be received in evidence (R. 1001).

V.

STATEMENT OF FACTS.

The case was called for trial on April 23, 1957, the Honorable Harry C. Westover, Judge, presiding. The trial judge did not advise petitioner, through the interpreter, of the petitioner's Constitutional rights and statutory rights to trial by jury. The jury was waived in this criminal case by defense counsels and the United States Attorney without the trial judge participating therein. An interpreter was sworn, and remained present throughout the trial (R. 3).

Inasmuch as this petition for writ of certiorari is made by only one of the defendants it is deemed appropriate to focus attention to those facts pertaining to the action of petitioner's co-defendants. This is a conspiracy case involving a long term of imprisonment without possibilities of parole even though the facts reveal that petitioner is a first offender without any previous arrests for any crime whatsoever. Petitioner claims here, as he did in the District Court and the Circuit Court of Appeals below, that he is innocent of the crimes charged and that he was woven into a net of circumstances over which he had no control. The record of evidence fails to establish that petitioner entered into an agreement with Ramos or Gomez in respect to the 25 ounces of heroin. The facts, leading up to the time of petitioner's arrest may be summarized from the record as follows:

Petitioner testified that he had driven to Los Angeles from Mexicali, Mexico, for the purpose of purchasing a truck (R. 656). He had about $2,300 with him and that he had withdrawn about $1,700 of the money from his bank in Mexicali (R. 822) for the purpose of buying a truck.

This sum was withdrawn in December, 1956, and was kept in his house (R. 822) after that date until he came to Anaheim on February 20, 1957.

That when he left Mexicali on February 20, 1957, he was with Issac Gomez Gomez and that Gomez was to drive petitioner's car back to Mexico if petitioner found and purchased a truck. Petitioner had no knowledge of any narcotic transactions between Gomez, Ramos and the Narcotic Agent Cantu and did not discuss narcotics with Gomez while enroute to Los Angeles. They left Mexicali about 9:45 or 10:45 A. M. and arrived in Anaheim about 4:30 p. m. (R. 664), after having stopped at Los Angeles where they arrived about 3 or 3:30 p. m. (R. 665). He was with Gomez at the restaurant, and then, about 6 p. m. he decided to rent a motel room to wash up and rest. They went to the A-1 Motel and registered and washed and rested for about 45 minutes, then left and went to a bar, and thereafter drove around and bought some liquor before they left town for Tijuana about 8 p. m.

Petitioner testified that they looked for the truck, which they had come to Los Angeles to buy, for "a short time" while he was driving around "looking at lots" (R. 695). He owned a "miscellaneous" store in Mexicali. While in the United States he bumped into Ramos in Anaheim completely by accident (R. 690).

The transcript of the evidence shows that Ramos testified that he received the 35 ounces of heroin from a Mexican named Ysidro Lopez (R. 539) on the 20th of February (R. 540) and he denied receiving it from Issac Gomez (R. 541). Ramos admitted that he brought it across the border (R. 541) to Anaheim in a 1950 or 1951 White Chevrolet which he borrowed from a friend (R. 542). Ramos claimed he was employed by Ysidro Lopez to bring the heroin to

Anaheim and that he was not employed by Gomez or petitioner (R. 543). He admitted that the coat, Exhibit 5, was his (R. 545). When he (Ramos) left Mexicali he had the heroin in the springs of the seat of his car. Ramos testified he put some of the heroin in his coat when he was at the Highway 101 Motel where he had registered and later had accidentally bumped into petitioner on the street in Anaheim while petitioner and Gomez were together.

At the time of petitioner's arrest the agents claimed that they found a card from the Highway 101 Motel, Orange, California, in the glove compartment of petitioner's car (R. 913-914). Petitioner denied that he had been registered at the Highway 101 Motel; and testified that he had been registered at the A-1 Motel in Anaheim (R. 697). The Government made no investigation or attempt to prove that petitioner was registered at the Highway 101 Motel and relied on the fact that the possession of the card (Government's Exhibit No. 7)—(R. 700) was proof that petitioner had been there.

The Government's case against petitioner was based upon the fact that he had been in Anaheim, California, on February 20, 1957. There was no evidence of record that petitioner participated in the crime of conspiracy or had knowledge of the presence of the narcotic in his car which had been planted there by Ramos while petitioner was away from his car. Two agents of the Narcotic Division testified that they observed petitioner standing on a corner talking to Gomez. The results of these two agents' observations may be summarized as follows: Ramos was seen walking East on Center Street in Anaheim at about 3:45 p.m. on February 20, 1957, by William Gilkey, a Narcotic Agent (R. 248). At that time Ramos was wearing a jacket (R. 255). At about 4:15 or 4:30 p.m. Ramos was seen by Gilkey

talking to Gomez and petitioner on the corner of Center and Los Angeles Streets. Gilkey later saw Ramos with Frank G. Vronek at the Highway 101 Motel (R. 253). This was about 6:45 p.m. or 7:00 p.m. and at that time Ramos was not wearing his jacket (R. 255). Gilkey testified that after Gomez and Petitioner had the conversation with Ramos just referred to he observed them entering the two-tone black Buick with Baja license plate (R. 253). They drove around Anaheim for about an hour after which the witness lost them due to a car failure (R. 254).

Frank G. Vronek, an investigator of the District Attorney's office testified that on February 20, 1957, he saw Ramos in the Valencio Hotel Coffee Shop. Cantu was with Ramos and they conversed in Spanish in his presence for about five minutes (R. 268). At the conclusion of the conversation Cantu told Vronek to stay with Ramos and left. Ramos was eating some pie and they conversed in English. Ramos said that he was going to leave; that Vronek should wait for him as he was going to meet Issac and that there was another man with Issac whom Issac did not want anyone else to see (R. 269). He remained in the cafe until Mr. Cantu returned. He also saw Gomez on that day about 4:40 p.m. He saw Gomez going out of the driveway of a cafeteria located at the corner of Los Angeles and Center Street in Anaheim. Petitioner was with Gomez (R. 271). He had a brief conversation with Gomez and when this was finished Gomez spoke to petitioner in Spanish after which petitioner left them and walked to a bar on Los Angeles Street. Gomez thereupon crossed Center Street and the witness lost sight of him (R. 272).

An hour later he saw Gomez walking past Agent Cantu's Government vehicle and he called Gomez back to the vehicle (R. 273). He later saw Ramos about 5:35 p.m.

seated in a Grey Chevrolet Coupe with Baja, California, plates. He entered the Chevrolet (R. 274). Ramos was not wearing a jacket at the time, but he had been wearing one about 3:40 in the afternoon when he had previously seen Ramos. At 5:35 p.m. it was cool (R. 276). They drove to Center Street near Los Angeles Street in Anaheim, parked the vehicle, and Ramos got out looking for Issac Gomez (R. 277). The witness then saw Gomez and petitioner on the sidewalk near a barber shop on Los Angeles Street. They were talking (R. 278). Each of the defendants talked but the witness could not understand the words. Ramos directed the conversation to Gomez at which time Gomez turned to petitioner and the witness observed petitioner making a motion with his head as if to make a negative answer (R. 280). Then Ramos returned to the car and said to the agent, "Issac doesn't want to give me the 25 ounces. The other man, he has got a deal, and he is the reason why Issac doesn't want to deal" (R. 280-281).

During the trial counsel for petitioner invoked the rule that any statement of any one of the codefendants made to the agents should be considered only as evidence against the defendant making the statement. The Court sustained each objection throughout the trial and ruled that: "The objection is good. The conversation cannot be considered in regard to Padilla" (R. 226). Petitioner did not speak to any narcotic agent and was not present when Ramos and Gomez talked to Agent Cantu and Vronek. Ramos denied that he told the agents that petitioner was involved and Ramos' testimony was not impeached (R. 461 through 651). At the conclusion of the trial the Court granted the Government's motion that all evidence with respect to the acts and declarations of the defendant Ramos on the 20th of February, 1957, and up to the moment of his arrest be received in evidence and con-

sidered as to the petitioner; that all of the acts and declarations of the defendant Gomez up to the moment of his arrest be received in evidence as to petitioner; and that all acts and declarations of petitioner be received and considered as to all defendants (R. 1001). The Court deferred ruling on this motion until Conclusion of the Case, and after having heard all evidence the Court granted the motion (R. 1001).

VI.

QUESTIONS PRESENTED.

(1) May a defendant on trial for an infamous crime to violate the Narcotic Control Act waive trial before a jury where the statute creating the offense expressly states that such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury?

(2) Where a defendant is indicted for a conspiracy to violate the Narcotic Control Act, is the proof of the unlawful agreement necessary to sustain the judgment of conviction?

(3) May the United States Custom Agents refuse to return ($2,350.00) which was proven to have been withdrawn from defendant's bank account and later cleared through the Bureau of Narcotics as not being listed as marked money?

VII

STATUTE INVOLVED.

Each Count of the indictment was based upon Title 21 United States Code, Section 174, which provides in pertinent part as follows:

"Whoever *fraudulently or knowingly* imports or brings any narcotic drug into the United States or any Territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of any such narcotic drug after being imported or brought in, *knowing* the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than 5 or more than 20 years * * *"

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of a narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction *unless the defendant explains the possession to the satisfaction of the jury.*" (Italics supplied).

VIII.

REASONS RELIED UPON FOR THE WRIT.

1. The decision of the United States Court of Appeals for the Ninth Circuit has decided an important question of federal law under the Narcotic Control Act which has never been decided by this Honorable Court and so far departs from the usual course of judicial proceedings so as to call upon this Honorable Court's power of supervision.

2. The decision of the United States Court of Appeals for the Ninth Circuit holding that, notwithstanding the provisions of the statute which creates the offense and contains the word "jury", petitioner could waive trial before a jury hinges on a State Court's decision and is in conflict with the provisions of the United States Constitution, which provides that "the trial of all crimes, except in cases of impeachment, shall be by jury * * *" Article III, Section II, Clause III; 21 U.S.C.A., Sec. 174.

3. The decision of the United States Court of Appeals for the Ninth Circuit holding that there was sufficient evidence to sustain the convictions on counts four and five is unsupported by the record and conflicts with decisions of other Circuit Courts of Appeals on the same subject matter; the decision also conflicts with past decisions of the Ninth Circuit Court of Appeals on the same subject matter.

4. The decision of the United States Court of Appeals for the Ninth Circuit is in direct conflict with outstanding cases decided by this Honorable Court on the same subject matter.

5. The decision of the United States Court of Appeals for the Ninth Circuit is so lacking in essential elements of due process of law as required by the Fifth Amendment as to render its decision reversible on the bases of the trial record.

IX.

THE LAW AND THE ARGUMENT IN SUPPORT OF REASONS FOR ALLOWING THE WRIT.

POINT I.

Petitioner's Plea of Not Guilty to the Possession of the Narcotic Drug Invoked the Statutory Presumption and the Trial Court Should Have Rejected the Waiver of Jury in This Criminal Case.

(A) The United States Circuit Court of Appeals for the Ninth Circuit Erred in Holding That Trial by Jury Could Be Waived in This Criminal Case.

It is respectfully urged here that the right of trial by jury is a right guaranteed by the Federal Constitution. Article III, Section II, Clause III, provides *inter alia*, that:

> "*The trial of all crimes*, except in cases of impeachment, *shall be by jury* * * *; * * *." (Italics supplied).

In the case at bar the statute here (21 U.S.C.A., Section 174) speaks of "*whenever on trial*" the defendant is shown to have or to have had possession of a narcotic drug, without mentioning of pleas of guilty, or mentioning sales or receiving or concealment of the narcotic drug, the presumption being that the burden of proof is on defendant to explain how the narcotic drug came into his possession (Italics supplied).

The Court below in its casual *Per Curiam* decision said:

> "*We doubt* if the Congress meant any more than 'trier of the facts' when it used 'jury.'"[3] (Italics supplied).

It is quite apparent that had the Congress not intended that the explanation be made to a jury it would have no doubt used words to that effect. The Court of Appeals below was not certain of the intent of Congress in that the Court said "*We doubt*" if the Congress meant any more than "trier of the fact" when it used "jury." The Court below then hinged its finding on a State Court's decision in *Nathanson* v. *Murphy*, *supra*, without any citation of law from any federal Court of the United States. Petitioner urges that the Congress intent was, "that when a defendant entered a plea of not guilty", that the issue as to possession of the narcotic drug should be explained to a jury. The Congress intent here rests upon the fact that possession of narcotic drugs is not an offense and merely

---

3. Cf. *Nathanson* v. *Murphy*, 132 Cal. App. 2d 363, 282 P.2d 174.

a rule of evidence. *United States v. Landry*, 7 Cir., No. 12,268, . F.2d , decided July 30, 1958. The statute creating the offense shifts the burden of proof on a defendant to prove his innocence. The Congress no doubt thought that a defendant would be in a better position to explain the possession to a jury of twelve, rather than explain it to the single judge sitting without a jury.

In the case at bar the United States in its brief (Govt. Br. p. 18) in the Court below said: "So the error of the Court, if any, in failing to force a jury upon appellant at the time he waived trial by jury, was non-prejudicial." It is urged here that the error of the district Court was highly prejudicial and deprived petitioner of that fair and impartial trial commanded by the Sixth Amendment to the United States Constitution. The Sixth Amendment to the United States Constitution provides, *inter alia*, that:

> "In all criminal prosecutions the accused *shall enjoy the right* to a speedy and public *trial by an impartial jury* of the state and district wherein the crime shall have been committed, * * *." (Italics supplied).

No doubt the Congress thought that a jury should be selected to try the issue where it is shown that a defendant had possession of the narcotic drug. By this statute (21 U.S.C.A., Section 174) providing for the intervention of a jury it would seem that the Court should have rejected the waiver and at least advised petitioner of his Constitutional and statutory rights to trial by jury. As may be seen from the record, there was no advice given by the trial judge on the right of trial by jury in this criminal case. Petitioner is a first offender of the law and the laws of the United States were alien to him at the time he signed the waiver. He could not speak or understand the English language at the time of trial. He

had no knowledge of the Constitution of the United States and no knowledge of the Narcotic Control Act. He was given a paper and asked to sign it without the Court explaining through the interpreter that he was entitled to a jury trial if he so desired; nor did the trial judge explain that petitioner had the right to explain the presence of the narcotic drug to the satisfaction of a jury, rather than the Court, if petitioner so desired. It is urged here that there was no waiver made intelligently and competently by petitioner and that neither the trial judge nor counsel explained to petitioner his rights under the Sixth Amendment and the statutory provisions of 21 U.S.C.A., Section 174. In *Glasser* v. *United States*, 315 U.S. 60, this Court said:

> "To preserve the protection of the Bill of Rights for hard-pressed defendants, every reasonable presumption against a waiver of fundamental rights is indulged."

Assuming, but not conceding, that trial by jury may be waived. In the case at bar there is the right to trial by jury guaranteed by the Constitution of the United States. Article III, Section II, Clause III. Still there is another right to trial by jury as embedded in the statute creating the offense. 21 U.S.C.A., Section 174. Therefore, it would require a waiver of trial by jury as guaranteed by the Constitution; and an express waiver of the statutory provisions of trial by jury as required by (21 U.S.C.A., Section 174). Which one of the provisions was waived by petitioner, *i. e.*, assuming trial by jury may be waived in a criminal case? The trial judge did not advise petitioner of his Constitutional rights or his statutory rights to trial by jury. Nor did counsel for petitioner advise him of his rights and merely suggested that the waiver be signed. It is urged here that petitioner did not waive

the provisions for trial by jury as required by the statute because he did not know the right existed. If petitioner did not intelligently and competently waive his rights under the Constitution and the statute to trial by jury, the guaranty stands as a judicial bar to a valid conviction. Cf. *Johnson* v. *Zerbst*, 304 U.S. 458. To preserve against the waiver of fundamental rights, see *Aetna Insurance Co.* v. *Kennedy*, 57 S. Ct. 809; *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 57 S. Ct. 724.

It is respectfully submitted that the Circuit Court of Appeals below erred in its holding that petitioner was not entitled to trial by jury. Its decision hinges on a state court's decision in *Nathanson* v. *Murphy*, *supra*, which is inapplicable to the statute (21 U.S.C.A., Section 174) and the intent of Congress.

POINT II

There Was No Proof of Guilt, Direct or Circumstantial, to Sustain the Trial Court's Finding of Guilt on Count Four of the Indictment.

(B) The United States Court of Appeals for the Ninth Circuit Erred in Holding There Was Sufficient Evidence to Sustain the Conviction on Count Four of the Indictment.

It is respectfully urged here that the record is devoid of any proof that petitioner knowingly and fraudulently, after importation, transported the narcotic drug and facilitated the transportation and concealment in violation of 21 U.S.C.A., Section 174. The argument here is that there was no evidence that petitioner knowingly and feloniously transported the narcotic drug as charged in Count four. The testimony shows that (Ramos a codefendant) testified that he placed the jacket containing the twenty-five ounces of heroin in a green car without knowing who owned the

car (R. 570). Ramos further testified that when he placed the jacket in the green car he did not know who drove the car (R. 570-571).

It is urged here that the statute (21 U.S.C.A., Section 174) creating the offense expressly provides that whoever fraudulently or knowingly commits any of the acts denounced by the statute is guilty of an offense. The indictment here charges that petitioner knowingly received and concealed and facilitated the transportation of 25 ounces of heroin. If the facts show that petitioner did not have knowledge of the presence of the heroin in his car, at the time he left Anaheim, he would not be guilty of the charge set forth in Count four. It is argued that "the possession must have been with guilty knowledge or intent" and the inferences reasonably to be drawn from the evidence must not only be consistent with his guilt but inconsistent with every reasonable hypothesis of his innocence. *Kassin v. United States*, 5 Cir., 87 F. 2d 183, 184. It is not reasonable to believe that petitioner would have consented to the presence of the heroin in his car knowing that he would be stopped at the border by Custom Agents. It is argued here that when Narcotic Agent Carter testified that Ramos told him that the other man with Gomez was advising Gomez not to make the delivery, the record shows (R. 42, 63, 66, 73), that petitioner's counsel objected as follows:

Mr. Fitzpatrick: I will object to this as to the defendant Padilla.

The Court: It can be received only as against Ramos.

Mr. Fitzpatrick: Objected as to the defendant Padilla, your Honor.

The Court: This can be received only as to the defendants Gomez and Ramos.

Mr. Fitzpatrick: I object to that as to the defendant Padilla.

The Court: It can only be received as to the defendants Gomez and Ramos.

It is respectfully shown that other Narcotic Agents testified as to what they had observed and as to what Ramos had supposedly told them and the Court of first instance ruled (R. 226) that Laurence Katz statement could not be considered in regard to Padilla; the same ruling also applied to the testimony of William Gilkey (R. 247 through 267); the same ruling also applied to the testimony of Frank G. Vronek (R. 267 through 317). Ramos denied that he had told the agents anything about petitioner (R. 461 through 651).

It is urged here that to make the provisions of (21 U.S.C.A., Section 174) applicable to petitioner, it was necessary to prove that petitioner was acting in concert with Ramos. *Thomas* v. *United States*, 10 Cir., 239 F. 2d 7, at page 10, the Court said, "There was no evidence that Thomas at any time had physical possession of the package. Therefore, in order to make the provisions of 21 U.S.C.A., Section 174, applicable to Thomas, it was necessary to prove that she was acting in concert with Williams. The evidence indicated and warranted the inferences that that package was intended for Williams, who manually accepted and received it and placed it on the coffee table. *Thomas merely created a suspicion of guilt and that it was insufficient to sustain a verdict of guilt.*" (Italics supplied).

In the case at bar the facts reveal that petitioner did not have physical possession of the jacket containing the heroin and the jacket was found on the back seat of petitioner's car by the arresting officers in the same position when placed there by Ramos.

In the case at bar the record of testimony falls short of being substantial evidence to sustain the government's

position that petitioner knowingly transported and facilitated the concealment and transportation of the narcotic drug. Petitioner's explanation as to the presence of the narcotic drug being in his car at the time of arrest appears in the record (R. 815 through 831). His testimony was unimpeached and a jury would have been in a better position to judge the facts (21 U.S.C.A., Section 174) than a judge sitting without a jury. Petitioner refers this Court to the decision of *United States* v. *Landry*, 7 Cir., No. 12, 268, F. 2d , decided July 30, 1958, which was reversed on precisely the same question tendered by the present petition, the Court citing numerous cases, said: "But no Court, so far as we are aware, had held that proof of possession by one person may be established by circumstantial evidence when the undisputed direct proof places the possession in some other person. It would not be helpful to quote the numerous definitions of the words "possess" and "possession" which have been called to our attention. As good a definition as we have seen is that of this Court in a criminal case, *United States* v. *Wainer*, 170 F. 2d 603, 606, the Court stated:

> "*To 'possess' means to have actual control, care and management of*, and not a passing control fleeting and shadowy in its nature." (Italics supplied).

In the case at bar the facts reveal that petitioner did not have actual control, care and management of the narcotic drug planted in his car by Ramos. Some of the facts may have created a mere suspicion of guilt against petitioner. But, as was said in *Thomas* v. *United States*, *supra*, at page 9, that:

> "Evidence which creates a mere suspicion of guilt is not sufficient to sustain a verdict of guilty. *Vick* v. *United States*, 5 Cir., 216 F.2d 228, 233; *Garrison* v. *United States*, 5 Cir., 165 F.2d 874; *Eng Jung* v. *United*

States, 3 Cir., 46 F.2d 63, 67; *Philphaw* v. *United States*, 8 Cir., 29 F.2d 225, 227; *Callagh* v. *United States*, 8 Cir., 15 F.2d 929, 931."

It is urged here that it is a fundamental rule that there must be substantial evidence of guilt in order to sustain a conviction. 12 Cyclopedia of Federal Procedure, 3rd Edition, Section 51-75, paragraphs 481-482; *United States* v. *Yeoman-Henderson, Inc.*, 193 F.2d 867 (7th Cir. 1952). The terms "substantial evidence" within the requirement of this rule has been construed to mean sufficient relevant evidence to cause a reasonably prudent person to accept as adequate to establish a defendant's guilt. 12 Cyclopedia Federal Procedure, 3rd Edition, Section 51-72, par. 448; See *Woodward Laboratories* v. *United States*, 198 F.2d 995, 998 (9th Cir. 1952). It has been stated that the evidence relied upon as "substantial" within the meaning of the above rule must be such as to exclude every reasonable explanation other than guilt. 12 Cyclopedia of Federal Procedure, 3rd Edition, p. 463; see *Yoffe* v. *United States*, 153 F.2d 570 (1st Cir. 1946). Failure to meet the exacting standards of the substantial evidence rule requires reversal of a conviction. 12 Cyclopedia of Federal Procedure, p. 483; *Yoffe* v. *United States*, *supra*.

It is respectfully submitted that the Court of Appeals below seriously erred in holding that there was sufficient evidence to sustain the verdict of guilty on count four. The Circuit Court of Appeals below in its affirmance failed to cite any case and its decision is in conflict with the decisions of other Circuit Courts of Appeals on the same subject matter, as well as decisions of this Honorable Court.

POINT III.

There Was No Proof of Guilt, Direct or Circumstantial, That Petitioner Entered the Conspiracy on February 20, 1957.

(C) The United States Court of Appeals for the Ninth Circuit Erred in Holding That There Was Sufficient Evidence to Sustain That Petitioner and Issac Gomez Gomez Trafficked in Narcotics from February 4, 1957 to March 13, 1957.

It is respectfully urged that count five of the indictment (the conspiracy count) insofar as petitioner is concerned fails to meet the requirements of Rule 7(c) of the Federal Rules of Criminal Procedure, and the provisions of the Sixth Amendment to the United States Constitution. In the case at bar the government failed to prove there was an agreement between the petitioner and Ramos or Gomez. The government introduced the testimony of the narcotic agents who testified they had observed petitioner walking with Gomez; there was no proof that petitioner agreed to meet co-defendant Ramos in Anaheim on February 20, 1957; the testimony further shows that certain government witnesses testified that Ramos had made certain statements to them about petitioner; this was denied by Ramos; the indictment (Count Five) does not charge that petitioner met Gomez or conversed with any person; it does not charge that he came to Anaheim or was registered at a motel or charge that he did anything other than transport the narcotic drug, the subject of the fourth count. Here, the question is, "did petitioner enter into an agreement with defendants Ramos and Gomez"? There was no evidence introduced to prove an agreement was entered into on February 20, 1957. The mere fact that he was seen walking or talking to Gomez does not prove he agreed to commit the offense, the subject of the fourth count. The Tenth Circuit Court of Appeals in reversing a conspiracy case in *Carlson* v. *United States*, 249 F.2d 85, 10 Cir., at p. 86, said:

"The indictment in its Count I does not charge the substance offense of carrying on the business of a retail liquor dealer without paying the tax, but rather a conspiracy to commit such an offense. The gist of the offense of conspiring as defined by 18 U.S.C., Sec. 371, is agreement among the conspirators to commit an offense attended by the act of one or more of the conspirators to effect the object of the conspiracy. *United States v. Falcone*, 311 U.S. 205, 210, 61 S. Ct. 204, 85 L. Ed. 128; *Braverman v. United States*, 317 U.S. 49, 53, 63 S. Ct. 99, 87 L. Ed. 23. The controlling question on this count is whether Carlson entered into a conspiracy to carry on the business of a retail dealer at the Chambless premises, 4901 Northwest 50th Street, Oklahoma City, Oklahoma. There is no showing that appellant Carlson knew of such conduct on the part of Stone or acquiesced therein. *The charge is one of conspiracy. The gist of the offense is the agreement coupled with an overt act.* * * *" (Italics supplied).

In the case at bar the charge here is one of conspiracy. The gist of the offense is the agreement coupled with an overt act. *Carlson v. United States, supra.* In the case at bar it is urged that the evidence showed that an agent testified that Ramos said, "that the other person with Gomez was advising Gomez not to make a sale" (R. 280-281). Here, the conspiracy (count five) is the subject of the fourth count to transport, conceal and facilitate the transportation of the heroin. There was no evidence introduced by the government that petitioner entered into an agreement to transport and conceal the heroin, the subject of the fourth count. In *Tinsley v. United States*, 43 F.2d 899 (C.C.A. 8), the defendant was charged with conspiracy to commit larceny. The evidence showed Tinsley to be the central figure in the conspiracy, and that he had hired two persons named Widow and Eagle to steal horses and deliver them to him. There was no

connection between the work each was doing. They did not work together or carry out any arrangement to which both were parties. Neither had knowledge of the arrangement of the other. In holding that this evidence showed separate and distinct conspiracies and not one general conspiracy alleged in the indictment, the court said:

> "We are forced to the conclusion that the evidence does not show any mutual understanding or plan whereby appellant and Widow and Eagle were to cooperate in the stealing of horses. * * * *or that the minds of these parties met understandingly, to carry out a deliberate agreement* to commit the larcenies charged in the indictment. The evidence does not tend to show a conspiracy between Tinsley and Widow and Tinsley and Eagle, but they were separate distinct conspiracies and not the one charged in the indictment. This is not sufficient." *Terry* v. *U. S.*, 7 F.2d 28 (C.C.A.); *Wiart et al.* v. *U. S.*, 23 F.2d 791 (C.C.A.); *Stubbs* v. *U. S.*, 249 Fed. 571 (C.C.A.). (Italics supplied.)

In the case at bar the evidence does not show any mutual understanding or plan whereby petitioner and Ramos and Gomez were to cooperate in the transportation and concealment of the heroin or that the minds of the petitioner Ramos and Gomez met understandingly to carry out a deliberate agreement to commit the transportation charged in count five of the indictment. *Tinsley* v. *United States*, *supra*. In a conspiracy there must be some unity of purpose, design and understanding, some meeting of the minds in an unlawful agreement. There was none here. The conspiracy under count five as to this petitioner did not exist, was not proven, and merits consideration by this Honorable Court.

It is further argued that there was no showing that the statement made by Ramos to the Narcotic Agents were made in the presence of petitioner and the conspiracy

charged cannot be established against an alleged conspirator by evidence of the Acts or declarations of his alleged co-conspirators done or made in his absence. *Hauger* v. *United States*, 173 Fed. 54 (4 Cir.); *United States* v. *Richards*, (D.C. Neb. 1906) 149 Fed. 443. See also, *Thomas* v. *United States*, 57 F.2d 1039 (10 Cir.), the court at p. 1041, said:

> "To render evidence of the Acts or Declarations of any alleged conspirator admissible against his alleged co-conspirator, the existence of the conspiracy must be shown and the connection of the latter therewith established." *Pope* v. *United States*, 289 Fed. 312, 315; *Kelton* v. *United States*, 294 Fed. 491, 495; *Isenhour* v. *United States*, 256 Fed. 842; *United States* v. *Goldberg*, 7 Miss. 175 Fed. Cas. No. 15,233; *United States* v. *McKee*, 3 Dill. 551, Fed. Cas. No. 15,686; *Burns* v. *United States*, 279 Fed. 982. See also, *Kuhn* v. *United States*, 9 Cir., 26 F.2d 463.

POINT IV.

The Refusal of the United States Custom Agents to Return the Money Belonging to the Petitioner Violates the Due Process Clause of the Fifth Amendment.

(D) The United States Circuit Court of Appeals for the Ninth Circuit Erred in Holding That It Did Not Have Power to Order the Money ($2,350) Returned to Petitioner.

It is respectfully urged that the question concerning the money was properly before the court of first instance.

The record of evidence shows as follows:

By Mr. Fitzpatrick:

Q. Did you have some money to buy a truck?

A. Yes.

Q. How much did you have?

A. I do not know exactly.

Q. Approximately.

A. I had about $2,300.00

Q. Where did you get that money?

A. That money, I took it out of my bank.

Q. What is the name of the bank?

A. Banco Mexicano de Occidente.

Q. Is that in Mexicali?

A. Yes.

Q. They have records of your withdrawals, is that correct?

Mr. Abbott: I will object, your Honor, I don't think the witness knows what records the bank has.

The Court: Sustain the objection.

Mr. Fitzpatrick: Very well, your Honor.

The Court: I suppose banks do have records.

Mr. Fitzpatrick: Thanks your Honor (R. 658)

Mr. Fitzpatrick: For the defendant Padilla, your Honor, I would like to renew my motion for the purpose of the record here. One ground is the insufficiency of the evidence as to Count 4, and also to Count 5.

Another is a motion for new trial on the ground of entrapment.

Another is a motion for new trial on the ground of illegal search and seizure.

Another is on the ground of prejudicial error committed by the Government's prosecuting attorney when he stood up in open Court and said to his Honor that he had checked the bank in Mexicali as to whether or not Padilla had an account there and they told him that there was no account.

I have submitted to the probation officer the defendant's account in that bank. It is not in his Honor's file there because the probation officer didn't have this in

time to get it to his Honor but it is in the probation officer's possession.

The Court: I have the report here and I have the record of the bank account.

Mr. Fitzpatrick: Does it show a bank account?

The Court: Yes.

Mr. Fitzpatrick: Then your Honor will notice that that bank account shows withdrawals at the time that the defendant said that the money was withdrawn and I submit it was prejudicial error for the government attorney to stand up here in Court and represent to his Honor as was represented. I am not saying that he was not in good faith when he said it. I am saying that he had obtained erroneous information and I feel this swayed the Court because the Court spent a great deal of time and asked numerous questions of the defendant as to when the withdrawals took place. I feel it swayed the Court toward its final decision.

The Court: Your motion is denied.

It is urged here that a letter from the Treasury Department, Bureau of Customs, San Diego 1, California, to Louglin E. Waters, United States Attorney, dated June 17, 1958, advised, in pertinent part, as follows: "Also, discovered in the glove compartment of the automobile was $2,156.00 in United States currency, and on the person of Gonzales $127.52 * * *. The $2,156.00 found in the automobile and the $127.52 found on the person of Gonzales were detained and placed in the custody of the Collector of Customs, San Diego. This was done pending further investigation and checking of the serial numbers to determine if any of the bills were listed with the Bureau of Narcotics as marked money. It was ascertained that the bills were not listed * * *."

It is urged here that the District Court below did not impose a fine; that the United States claims that it has a right to detain the money in the event that a future judgment is filed for penalties in a future Civil action for importing into the United States the heroin in question. But as shown from the transcript of record (R. 461 through 651) Antonio Espinoza Ramos confessed from the stand that he brought the heroin from Mexico and that petitioner was not involved. The Fifth Amendment declares that no person shall be deprived of his property without due process of law.

It is respectfully submitted that the petitioner proved the money was his and the Court below erred in holding that it did not have power to order the money returned to petitioner.

X.

PRAYER FOR THE WRIT.

It is respectfully prayed that the petition for Writ of Certiorari should be granted.

Respectfully submitted,

CRISTOBAL GONZALES PADILLA,
#75128—P. M. B.,
Leavenworth, Kansas.

Dated: July 22, 1959.

VERIFICATION.

United States of America,
State of Kansas,
County and City of Leavenworth—ss.

Cristobal Gonzales Padilla, having been first duly sworn, deposes and says that: He is the petitioner in the attached petition for writ of certiorari; that he has read and knows the contents of same; the same is true and correct to the best knowledge and belief of this affiant.

/s/ Cristobal Gonzales Padilla,
Affiant.

Subscribed and sworn to before me this 6th day of July, 1959.

/s/ R. H. Cleghorn,
Parole Officer.

"Authorized by the Act of July 7, 1955, to administer oaths (18 U.S.C. 4004)."

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

CRISTOBAL G. PADILLA,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

No. 16,162
May 6, 1959

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

Before: CHAMBERS, BARNES and JERTBERG, Circuit Judges.

PER CURIAM:

Padilla with one Gomez was convicted of count four of a narcotics indictment charging that on February 20, 1957, the two received, concealed and transported and facilitated the concealment and transportation of 25 ounces of heroin. The fifth count involved the same two defendants and charged a conspiracy involving trafficking in narcotics during the period February 4, 1957, and March 13, 1957.

There is ample evidence with permissible inferences to justify conviction on both counts. (The case was tried before a district judge, the defendant having expressly waived a jury.) The arguments of Padilla here on the sufficiency of the evidence are really arguments properly addressed to him who is originally weighing the evidence. All reasonable and permissible intendments on the evi-

dence, on appeal, are now against the defendant because he lost below.

Also, Padilla now relies heavily on that part of 21 U.S.C., § 174, reading as follows:

* * *

> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of a narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the *jury*."

His projection is that because the sentence above says "jury", he, Padilla, had no right to waive the jury: that the Congress intended that all cases like his should be tried before a jury. We doubt if the Congress meant any more than "trier of the fact" when it used "jury".[1] It certainly is fanciful to believe that thereby it meant all of these narcotics cases must be tried before a jury. And, there is plenty of evidence here in Padilla's case to sustain his conviction without the *prima facie* presumption of the statute.

Also Padilla asserts error in the case because the court refused his motion to require the return of some $2,350.00 of his money found in his car and on his person at the time of his arrest.[2] This may or may not have been part and parcel of his narcotics transactions.

---

1. Cf. *Nathanson* v. *Murphy*, 132 Cal. App. 2d 363, 282 P.2d 174.

2. The government says $2,160.00 (or $2,156.00) was found in the car. And apparently $127.52 was found in Padilla's pockets. Thus, there is a discrepancy of about $60.00 or $65.00 in the sum involved.

Had the money come to the case as evidence, no order for disposition of the money should be made until the conviction is finally affirmed or the charges dismissed. But in the facts before us one finds that the arresting officers turned the money over to the United States collector of customs at San Diego. The money itself never came into the trial court's orbit. The collector of customs did not testify in the case. Had the trial court entered an order in this case directing the collector to return the money, it would have been highly improper. The res—the money—was not in court nor was the collector there as a party to the criminal trial. Padilla lost no rights to the return of the money by the mere denial herein of his motion to return the money.

What effect this affirmance of his conviction will have in the civil suit which the government suggests is pending in the United States District Court in Kansas wherein the government seeks to exact a civil penalty for the alleged unlawful importation of the 25 ounces of heroin, the subject of the fourth count of the indictment, is not before us for decision. Further, we do not have before us for decision the question of what will happen to Padilla's money if the government should be successful in its civil penalty suit.

Affirmed.

(Endorsed:) Per Curiam Opinion. Filed May 6, 1959.

Paul P. O'Brien,
Clerk.

Order Denying Rehearing.

Office of the Clerk
U. S. COURT OF APPEALS
P. O. Box 547
San Francisco 1, Calif.

Jun 4 1959

Mr. Cristobal G. Padilla,
PMB 75128, P. O. Box 1200,
Leavenworth, Kansas.

Dear Sir:

The Petition for a Rehearing and suggestion for rehearing En Banc, heretofore filed in case No. 16162, Cristobal Gonzales Padilla vs. U.S.A., was this day denied.

Pursuant to Rule 26, and unless stayed by the order of the Court, a mandate of this Court under said Rule will be due to issue on the expiration of five (5) days from the date hereof.

Very truly yours,

Paul P. O'Brien
Clerk

A5

Office of the Clerk
U. S. COURT OF APPEALS
P. O. Box 547
San Francisco 1, Calif.

Jun 12 1959

Mr. Cristobal Gonzales Padilla,
PMB #75128 P. O. Box 1200,
Leavenworth, Kansas

No. 16162
Padilla v. U.S.A.

Dear Sir:

For your information in the matter, I beg to advise that the mandate of this court under Rule 26 in above cause was this day issued and forwarded to the clerk of the court below.

Very truly yours,

Paul P. O'Brien
Clerk

cc-all counsel.

SUPREME COURT OF THE UNITED STATES

No.

October Term, 1958.

CRISTOBAL GONZALES PADILLA,
Petitioner,

v.

UNITED STATES OF AMERICA

Order Extending Time to File Petition for Writ of Certiorari.

Upon Consideration of the application of petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 3, 1959.

(s) W. O. Douglas.
Associate Justice of the Supreme Court of the United States.

Dated this 29th day of June, 1959.

Overt Acts from Conspiracy Count Five of the Indictment.

(1) On or about February 4, 1957, at the Don Juan Hotel, Calexico, California, defendant Antonio Espinoza Ramos and one R. S. Cantu held a conversation;*

(2) On or about February 4, 1957, at Calexico, California, defendant Antonio Espinoza Ramos delivered to one R. S. Cantu approximately 343 grains of Heroin and approximately 5½ ounces of smoking opium;

(3) On or about February 7, 1957, at Valencio Hotel Anaheim, California, defendant Antonio Espinoza Ramos and one R. S. Cantu held a conversation;

(4) On or about February 7, 1957, in Orange County, California, defendant Antonio Espinoza Ramos, delivered to one R. S. Cantu approximately 26 ounces of smoking opium;

(5) On or about February 12, 1957, in Los Angeles County, California, defendants Antonio Espinoza Ramos and Issac Gomez Gomez held conversations with one R. S. Cantu in an automobile at the Far and Near Bar, and at Leopold's Cafe;

(6) On or about February 13, 1957, defendants Antonio Espinoza Ramos and Issac Gomez Gomez held a conversation with one R. S. Cantu on the yacht "Petrel";

(7) On or about February 20, 1957, at Anaheim, California, defendant Gomez Gomez held a conversation with one R. S. Cantu;

(8) On or about February 20, 1957, at Motel 101, Orange, California, defendant Antonio Espinoza Ramos received and concealed approximately 9½ ounces of heroin;

*R. S. Cantu is an agent of the Narcotic Bureau.

LE COPY

FILED

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	6
Conclusion	10

CITATIONS

Cases:

Aeby v. *United States*, 206 F. 2d 296, certiorari denied, 346 U.S. 885 — 8

Casey v. *United States*, 276 U.S. 413 — 8

Delli Paoli v. *United States*, 352 U.S. 232 — 9

Glasser v. *United States*, 315 U.S. 60 — 9

Landsborough v. *United States*, 168 F. 2d 486, certiorari denied, 335 U.S. 826 — 8

O'Neal v. *United States*, 240 F. 2d 700 — 9

Phelps v. *United States*, 160 F. 2d 858, certiorari denied *sub nom. Peters* v. *United States*, 334 U.S. 860 — 9

Pitta v. *United States*, 164 F. 2d 601 — 8

Poliafico v. *United States*, 237 F. 2d 97, certiorari denied, 352 U.S. 1025 — 9

Stoppelli v. *United States*, 183 F. 2d 391, certiorari denied, 340 U.S. 864 — 8

United States v. *Chiarelli*, 192 F. 2d 528, certiorari denied, 342 U.S. 913 — 7, 8, 9

United States v. *Cohen*, 124 F. 2d 164, certiorari denied *sub nom. Bernstein* v. *United States*, 315 U.S. 811 — 9

United States v. *Hodorowicz*, 105 F. 2d 218, certiorari denied, 308 U.S. 584 — 9

United States v. *Iacullo*, 226 F. 2d 788, certiorari denied, 350 U.S. 966 — 9

United States v. *Manton*, 107 F. 2d 834, certiorari denied, 309 U.S. 664 — 9

United States v. *Morris*, 225 F. 2d 91, certiorari denied, 350 U.S. 901 — 9

Yee Hem v. *United States*, 268 U.S. 178 — 8

Statutes: Page

Act of Feb. 9, 1909, ch. 100, § 2(c), 35 Stat. 614 7
Act of July 18, 1956, ch. 629, title I, § 105, 70 Stat. 570 7
18 U.S.C. 2 9
18 U.S.C. 1201 6
21 U.S.C. 174 ..... 2, 3, 6, 7, 8

Miscellaneous:

H. Rep. 2546 (Conf. Rep.), 84th Cong., 2d Sess. 7
43 Cong. Rec. 1681–1684, 1716 7
H. Rep. 2003, 60th Cong., 2d Sess. 7
H. Rep. 2388, 84th Cong., 2d Sess. 7

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 262

CRISTOBAL GONZALES PADILLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1–A3) is reported at 267 F 2d 351.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1959 (Vol. IX, 6).[1] A petition for rehearing was denied on June 4, 1959 (Vol. IX, 7). Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari through August 3, 1959 (Pet. App. A6), and the petition was filed on July 30, 1959.

[1] The record consists of nine volumes. Volumes III through VIII, which are consecutively paginated, constitute the transcript of proceedings in the district court and will be referred to as "Tr.".

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner could and did waive trial by jury on a narcotic offense in view of the fact that the statute authorizes conviction on the basis of proof of possession alone, unless the possession is explained to the satisfaction of the jury.

2. Whether the evidence was sufficient to support the conviction.

3. Whether the court of appeals erred in holding that the district court was without jurisdiction to order the return of money taken from the petitioner at the time of arrest, where the money was not an exhibit in the case.

STATUTE INVOLVED

21 U.S.C. 174 provides in pertinent part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years * * *.

> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

STATEMENT

Count four of a five-count indictment returned in the District Court for the Southern District of California charged petitioner and Isaac Gomez with the unlawful concealment and transportation of narcotics in violation of 21 U.S.C. 174. Count five charged that the petitioner, Isaac Gomez, and Antonio Espinoza Ramos conspired to illegally import, sell, transport, and conceal narcotics in violation of 21 U.S.C. 174 (Vol. I, 5–7). Petitioner and the other two defendants, all Mexican nationals, waived trial by jury (Vol. II, 14; Tr. 3–4). Petitioner and Gomez were found guilty on count four, and petitioner, Gomez, and Ramos on count five (Tr. 1001–1002).[2] Petitioner was sentenced to five years' imprisonment on count four and ten years' on count five, the sentences to run consecutively (Tr. 1006). On appeal, the judgment was affirmed (Vol. IX, 6). Petitioner alone seeks review by this Court.

The following are the pertinent facts:

On February 19, 1957, defendant Ramos, from whom Treasury agent Cantu had previously purchased narcotics (Tr. 18–19, 50–51, 173, 474), telephoned

[2] The first three counts charged Ramos alone with violations of the narcotic laws. Ramos was acquitted on count one and convicted on counts two and three (Tr. 452, 999, 1001).

Cantu that he and defendant Gomez would cross the border from Mexico on the next day with thirty-five ounces of heroin for sale and delivery (Tr. 78–79). On February 20th, Ramos drove from Mexico to Anaheim, California, where he met Cantu and Hronek, a county investigator, in a coffee shop and told them that he had thirty-five ounces of heroin for delivery[3] (Tr. 80–81; see Tr. 283). He also told Cantu that Gomez and another person had left Mexico in another car that same morning with "narcotics to be delivered to some person in San Fernando," and "that as soon as Gomez would finish with that, he would join us in Anaheim" (Tr. 81; see Tr. 283). Ramos further stated that Gomez "didn't want anyone else to see the other man" (Tr. 306). On February 20th, Gomez and petitioner admittedly drove from Mexico to California in petitioner's car (Tr. 658–659).

Subsequently, Gomez met Cantu in Anaheim, stated that he was ready to make the delivery, and directed Cantu to follow Ramos' car (Tr. 82–84, 845–847). Ramos, accompanied by Hronek, drove to a motel outside of Anaheim. There, Ramos told Cantu that Gomez wanted the money for ten ounces of heroin before Gomez would allow delivery of the remaining twenty-five ounces (Tr. 88). After this offer was rejected, Ramos and Hronek drove back to Anaheim where Ramos conversed with petitioner and Gomez on the street (Tr. 277–278). During this conversation, petitioner, who had been seen with Gomez on several earlier occasions that day (Tr. 251–252, 271,

[3] Ramos of course did not know that Cantu and Hronek were government agents.

300–302), was observed shaking his head from side to side (Tr. 280). Ramos then returned to tell Hronek, who was still in the car, that Gomez "doesn't want to give me the 25 ounces. The other man, he has got a deal, and he is the reason why [Gomez] doesn't want to deal" (Tr. 280–281). Ramos rejoined petitioner and Gomez for another conversation (Tr. 281). After again coming back to the car, Ramos told Hronek that Gomez wanted the money from the sale of the ten ounces first, and that petitioner did not want to go through with the deal (Tr. 282). He said that the remaining twenty-five ounces were in his (Ramos') jacket but that the jacket was in the possession of Gomez and petitioner (Tr. 282–283).

On returning to the motel, Ramos was arrested. During the subsequent search, a package, which on later analysis was found to consist of approximately 9½ ounces of heroin hydrochloride, was discovered between two mattresses and seized (Tr. 93–94, 337). Later that evening, Gomez and petitioner were stopped by police while driving near the Mexican border (Tr. 357–358, 372–373). Petitioner gave a fictitious name (Tr. 703). Ramos' jacket containing three packages was observed on the back seat of the automobile which belonged to petitioner (Tr. 396, 398–399, 402). On analysis, the packages were found to contain approximately twenty-five ounces of heroin hydrochloride (Tr. 347). The sum of $2156 (which petitioner claimed was his) and the registration card of the motel, where Ramos was to deliver the ten ounces of heroin and where Ramos was arrested, were found in the glove compartment of the car (Tr. 400–

401, 912–914). On searching the two men, the arresting officers found $130.52 on petitioner and $271.09 on Gomez (Tr. 374, 413).[4]

ARGUMENT

1. (*a*) Petitioner points to that portion of 21 U.S.C. 174, which places on the defendant the burden of explaining the possession of narcotics to the satisfaction of the jury, and argues that this provision imposes a jurisdictional limitation on the district court barring it from accepting a waiver of trial by jury (Pet. 13–15). This contention affects only the sentence on count four, since count five alleges a conspiracy to violate 21 U.S.C. 174, not a substantive violation of that section. Under the explicit terms of 21 U.S.C. 174, the presumption resulting from unexplained possession of narcotics applies only in a "trial for a violation of this section."

In any event, the government's case justifying a conviction (in contrast to the defendant's burden to explain possession) does not, under the statute, depend on any specific finding that *must* be made by a jury other than the normal finding of guilt beyond a reasonable doubt.[5] Since all narcotic cases, like

[4] At the close of all the evidence, the court granted the government's motion to admit the acts and declarations of each defendant, which had previously been limited to the particular named actor or declarant, against the other co-defendants (Tr. 1001).

[5] This situation contrasts with that under the kidnapping statute, 18 U.S.C. 1201, where the death sentence cannot be imposed unless the jury affirmatively so recommends. Thus, there can be no sentence of death unless there is a jury trial.

other criminal cases, are triable by jury absent a specific waiver, Congress said, in the proviso allowing the defendant to explain possession, that the explanation must be to the satisfaction of the jury. In other words, Congress was using the term jury in the sense of the normal finder of fact. If a defendant chooses to have the judge act as jury, by waiving jury trial, the explanation must be to the judge as the substitute for the jury.

Neither the legislative history of the origin of 21 U.S.C. 174 (Act of Feb. 9, 1909, ch. 100, § 2(c), 35 Stat. 614), nor its reenactment in amended form in 1956 (Act of July 18, 1956, ch. 629, title I, § 105, 70 Stat. 570), contains any intimation that Congress intended to withhold the usual right of defendants in criminal cases to choose to be tried by a judge rather than a jury. Similarly, there is no indication that Congress intended to limit the jurisdiction of the district courts in narcotic cases more narrowly than in other criminal cases. See H. Rep. 2003, 60th Cong., 2d Sess. (1909); 43 Cong. Rec. 1681–1684, 1716 (1909); H. Rep. 2388, 84th Cong., 2d Sess. (1956); H. Rep. 2546 (Conf. Rep.), 84th Cong., 2d Sess. (1956). Indeed, limitation of the jurisdiction of the district courts might interfere with the object of the statute in seeking to stamp out illicit traffic in narcotics. H. Rep. 2003, *supra*, pp. 1–2; H. Rep. 2388, *supra*, pp. 1, 7–13. It is thus evident Congress was not, in this statute, imposing a limitation which would bar the defendant from his usual right to waive trial by jury if he voluntarily and with understanding chose to do so. See, *e.g.*, *United States* v. *Chiarelli*, 192 F. 2d 528, 530 (C.A. 7), certiorari denied, 342 U.S. 913.

(*b*) Petitioner also contends (Pet. 15–17) that he did not intelligently and competently waive his right to a jury trial because he could not speak English and the right to a jury trial was not explained to him. Even aside from the fact that the record shows that petitioner could speak English (Tr. 655), this contention is without merit. Petitioner and his attorney signed a written waiver of a jury trial (Vol. I, 14). When the judge asked petitioner and his co-defendants in open court if they understood that their attorneys had waived a jury trial and that the case would be tried without a jury, they answered in the affirmative through an interpreter (Tr. 3–4). It is thus clear that petitioner knew of his right to trial by jury.

2. Petitioner's contention (Pet. 17–25) that the evidence was insufficient to support his convictions on counts four and five is also without merit. As petitioner did not satisfactorily explain the possession of twenty-five ounces of heroin hydrochloride taken from his car, this evidence of possession alone sufficiently supported his conviction on count four under 21 U.S.C. 174. *Casey* v. *United States*, 276 U.S. 413, 418; *Yee Hem* v. *United States*, 268 U.S. 178, 183–184; *Stoppelli* v. *United States*, 183 F. 2d 391, 394 (C.A. 9), certiorari denied, 340 U.S. 864; *Pitta* v. *United States*, 164 F. 2d 601, 602 (C.A. 9); *Aeby* v. *United States*, 206 F. 2d 296, 298, 299 (C.A. 5), certiorari denied, 346 U.S. 885; *United States* v. *Chiarelli*, *supra*, 192 F. 2d at 531; *Landsborough* v. *United States*, 168 F. 2d 486, 488 (C.A. 6), certiorari denied, 335 U.S. 826. Moreover, the evi-

dence demonstrated that the petitioner was an aider and abettor to the projected illicit sale and delivery of narcotics by Ramos and Gomez, and hence, under 18 U.S.C. 2, a principal to such an illegal sale. See *United States* v. *Cohen*, 124 F. 2d 164, 165 (C.A. 2), certiorari denied *sub nom. Bernstein* v. *United States*, 315 U.S. 811; *United States* v. *Chiarelli*, *supra*, 192 F. 2d at 531; *United States* v. *Hodorowicz*, 105 F. 2d 218, 220 (C.A. 7), certiorari denied, 308 U.S. 584.

As to count five, it is well settled that actual "[p]articipation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances.'" *Glasser* v. *United States*, 315 U.S. 60, 80. In other words, circumstantial evidence of concerted action and design is clearly sufficient. See *Delli Paoli* v. *United States*, 352 U.S. 232, 236; *Poliafico* v. *United States*, 237 F. 2d 97, 104 (C.A. 6), certiorari denied, 352 U.S. 1025; *O'Neal* v. *United States*, 240 F. 2d 700, 702 (C.A. 10); *United States* v. *Morris*, 225 F. 2d 91, 93 (C.A. 7), certiorari denied, 350 U.S. 901; *Phelps* v. *United States*, 160 F. 2d 858, 867–868 (C.A. 8), certiorari denied *sub nom. Peters* v. *United States*, 334 U.S. 860; *United States* v. *Manton*, 107 F. 2d 834, 839 (C.A. 2), certiorari denied, 309 U.S. 664. In the light of these established principles, the facts set forth in the Statement, *supra*, pp. 3–6, amply support the conclusion that petitioner was actively co-operating with his co-defendants in their illegal enterprise and was therefore guilty of conspiracy. Cf. *United States* v. *Iacullo*, 226 F. 2d 788, 794–795 (C.A. 7), certiorari denied, 350 U.S. 966; *Poliafico* v. *United States*, *supra*, 237 F. 2d at 104–106.

3. Petitioner claims (Pet. 25–28) that the court of appeals erred in holding that the district court was without jurisdiction to order the return of the money taken from petitioner at the time of his arrest. The right to this money, however, is a matter to be adjudicated in a civil suit and not an issue to be decided in the criminal trial. Although the fact that the money was taken was adduced at the trial, it was not offered in evidence and was not in the custody of the United States Attorney or the agents who testified at the trial.* Therefore, as the court of appeals held (Pet. App. A3), the money never came within the control of the district court in this proceeding. Moreover, at no time did petitioner ask the district court for the return of the money.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
MALCOLM R. WILKEY,
Assistant Attorney General.
BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys.

AUGUST 1959.

* The money was in the custody of the United States Collector of Customs at San Diego (Pet. App. A3).

U. S. GOVERNMENT PRINTING OFFICE 1959